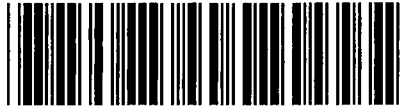




Control Number: 51415



Item Number: 458

Addendum StartPage: 0

SOAH DOCKET NO. 473-21-0538
PUC DOCKET NO. 51415

2021 MAY 11 PM 12:41

APPLICATION OF SOUTHWESTERN § BEFORE THE STATE OFFICE
ELECTRIC POWER COMPANY FOR § OF
AUTHORITY TO CHANGE RATES § ADMINISTRATIVE HEARINGS

**SOUTHWESTERN ELECTRIC POWER COMPANY'S
RESPONSE TO EASTMAN CHEMICAL COMPANY'S
MOTION TO STRIKE REBUTTAL TESTIMONY**

The Administrative Law Judges (ALJs) should deny Eastman Chemical Company's (Eastman) motion to strike the rebuttal testimonies of Southwestern Electric Power Company (SWEPCO) witnesses Charles J. Locke and C. Richard Ross and strike portions of John O. Aaron's and Jennifer L. Jackson's rebuttal testimonies in this case.¹ The reasons for denying this motion include the following:

- Eastman has misstated and misapplied SWEPCO's burden—asserting that a party's initial burden of production is contingent upon and involves preemptively rebutting issues other parties might raise—a burden that would be enormous and unreasonably onerous in a case like this one.
- SWEPCO met its initial burden of production and set forth a *prima facie* case on the reasonableness and allocation of the transmission charges associated with SWEPCO's inclusion of load from retail behind-the-meter generation (BTMG) in its load data reported to Southwest Power Pool (SPP).
- Under the Commission's standard, this is a definitively "low burden"—consisting of that level of evidence from which the ALJs could infer the fact at issue. Here, the ALJs could infer the facts at issue from the evidence of the costs, the testimony provided, and the proposals for allocating these transmission charges. Moreover, under Commission precedent, SWEPCO's evidence sufficiently demonstrated the transmission charges were reasonably and prudently incurred.
- Eastman presses this issue in the guise of a half-articulated unfounded due process claim despite having been deprived of no procedural right or process due in this proceeding and having shown no harm or violation of its substantial rights.

¹ Eastman filed its motion to strike on May 4, 2021. In accordance with SOAH Order No. 2, this response is timely filed.

- Eastman has not alleged—much less established—any actual harm or prejudice arising from its purported lack of notice on the issue it challenges.

The rebuttal testimonies of Messrs. Locke and Ross are material and relevant to the resolution of a disputed issue in this case and constitute proper rebuttal testimonies squarely addressing the specific arguments and contentions of two intervenor witnesses on the issue of SWEPCO's inclusion of load associated with retail BTMG in SWEPCO's transmission load reporting to the SPP.² As such, Eastman's motion is without merit and should be denied.

I. SWEPCO'S RESPONSE TO EASTMAN'S MOTIONS TO STRIKE

A. Procedural Background

SWEPCO has transferred functional control of its transmission facilities to the SPP Regional Transmission Organization (RTO).³ To serve its retail and wholesale customers, SWEPCO purchases Network Integration Transmission Service (NITS) from SPP in accordance with SPP's Open Access Transmission Tariff (OATT).⁴ The Commission has recognized that SWEPCO is obligated to pay the charges it incurs for transmission service provided by SPP pursuant to the SPP OATT and has further determined that proof that such charges were billed to and paid by SWEPCO requires no additional proof to demonstrate the reasonableness of the charges for retail ratemaking purposes as a matter of law.⁵ Accordingly, as part of SWEPCO's direct case in this proceeding, SWEPCO supplied evidence of the charges it incurred from SPP, testimony addressing the charges, and its rate proposals to allocate those charges.⁶

² The only issues Eastman raises with respect to John Aaron's and Jennifer Jackson's rebuttal testimonies is that they cite the testimonies of Mr. Locke and Mr. Ross, which Eastman claims are improper rebuttal testimonies.

³ Direct Testimony of Daniel R. Boezio at 5:1-2.

⁴ *Id.* at 5:2-4.

⁵ *Infra* at 7, n.23.

⁶ *Infra* at 5-8.

The controversy that has arisen with respect to these transmission charges is based on the inclusion of retail BTMG load in SWEPCO's monthly coincident peak load data, which SPP uses to determine each NITS customer's load ratio share of SPP's network transmission costs. Eastman and Texas Energy Industrial Consumers (TIEC) argue that including retail BTMG load in SWEPCO's monthly network load increases SWEPCO's load ratio share, is not required by the SPP OATT, and, in turn, improperly increases SPP's allocation of transmission charges to SWEPCO. On this basis, Eastman witness Ali Al-Jabir and TIEC witness Jeffry Pollock submitted testimony recommending a disallowance of \$5.7 million of transmission expense in their direct testimonies in this proceeding.⁷ Thereafter, SWEPCO filed rebuttal testimonies of Charles J. Locke, C. Richard Ross, John O. Aaron, and Jennifer Jackson to rebut the contentions and recommendations raised by TIEC and Eastman in this proceeding. Eastman's motion and this response followed.

Ultimately, Eastman seeks an unwarranted excessive sanction of striking SWEPCO's responsive and material rebuttal testimonies based on a faulty claim that SWEPCO failed to meet its burden of production. Stripped of the exaggerated claims and mischaracterizations, Eastman has at no point lacked adequate notice or meaningful opportunity to fully engage the issue it has challenged in this proceeding. In fact, Eastman never articulates, much less establishes, any harm to its substantial rights—nor could it considering the testimony it has filed, the parties' discovery requests and SWEPCO's responses developing a body of information on the issue, the upcoming hearing providing an opportunity to further develop its witness's testimony and to cross-examine

⁷ See Direct Testimony of Ali Al-Jabir at 28:8-21; Direct Testimony of Jeffry Pollock at 25:14-18.

SWEPCO witnesses on the issue, as well as the opportunity to develop and respond to arguments in its briefs and reply briefs.⁸

B. Argument and Authorities

1. SWEPCO met its *prima facie* burden on the BTMG transmission charge issue.

a. Applicable Legal Standard—Burden of Production and Proof

SWEPCO recognizes that as the Applicant in this proceeding, it has the burden of proof to show its proposed rate change is just and reasonable.⁹ And in a base rate proceeding such as this one, the initial burden of production is on SWEPCO.¹⁰ However, that burden shifts to other parties upon the utility making a *prima facie* case of prudence in the rate change.¹¹ A utility “may meet its burden without proving the reasonableness and necessity of every individual dollar paid on a granular level, but may present evidence that is comprehensive.”¹² Importantly, with respect to the showing required for a utility to meet its burden of production, “[p]rima facie evidence is merely that which suffices for the proof of a particular fact until contradicted and overcome by

⁸ Moreover, SOAH Order No. 9 has taken an additional measure to address even the possibility that parties “may have not had a sufficient and informed opportunity to file direct testimony regarding SWEPCO’s proposals addressing the allocation of transmission charges related to the Southwest Power Pool (SPP) and a proposed new transmission rate that would be charged to certain behind-the-meter generation (BTMG) customers” and has authorized the filing of supplemental direct testimony on the issue. *See* SOAH Order No. 9 (May 6, 2021). It is unclear what residual harm Eastman can claim under these circumstances. While SWEPCO does not agree that such a measure is warranted, to the extent parties have been granted the opportunity to file supplemental direct testimony, there is no justification supporting the requests for relief in Eastman’s motion.

⁹ *See, e.g.*, PURA § 36.006 (“In a proceeding involving a proposed rate change, the electric utility has the burden of proving that: (1) the rate change is just and reasonable, if the utility proposes the change; or (2) an existing rate is just and reasonable, if the proposal is to reduce the rate.”); *see also Gulf States Utils. Co. v. Pub. Util. Comm’n*, 841 S.W.2d 459, 475 (Tex. App.—Austin 1992, writ denied) (citations omitted) (describing burden of proof).

¹⁰ *Entergy Gulf States, Inc. v. Pub. Util. Comm’n*, 112 S.W.3d 208, 214-15 (Tex. App.—Austin 2003, pet. denied).

¹¹ *Id.* There is an initial presumption that the utility’s capital investments and expenditures are prudent until that presumption is rebutted by the intervenors. *Id.* (“Once that presumption is rebutted the burden falls on the utility to prove, by a preponderance of evidence, that the challenged expenditures were prudent.”).

¹² *Entergy Tex., Inc. v. Pub. Util. Comm’n*, 490 S.W.3d 224, 240 (Tex. App.—Austin 2016, pet. denied). However as noted below, SWEPCO *has shown* the reasonableness of the disputed transmission charges here invoiced by SPP and paid by SWEPCO, as a matter of law, under the Commission’s precedent.

other evidence.”¹³ The amount of proof required to satisfy this showing “is a low burden.”¹⁴ “[A] reasonable inference from the evidence presented is sufficient to establish a *prima facie* case.”¹⁵ As discussed below, SWEPCO well exceeded this level of proof on the issue of SWEPCO’s inclusion of the BTMG-related transmission costs incurred and its corresponding rate proposals to allocate such costs in this case.

b. SWEPCO exceeded its burden of production in its direct case.

SWEPCO, in good faith, addressed the statutory and regulatory factors governing this proceeding and has provided through its application and supporting testimonies, exhibits, schedules, and workpapers more than sufficient information to establish a *prima facie* case in support of its request for relief. SWEPCO’s direct case was indeed comprehensive, addressing the breadth of issues to be decided in this proceeding and offering evidence in support of its requests for relief. In its motion, Eastman simultaneously understates the level of proof SWEPCO offered in support of its direct case on the disputed issue here and overstates what SWEPCO was required to do establish a *prima facie* case on this issue.

Preliminarily, in its direct case, SWEPCO offered testimony establishing its membership in SPP, that it has ceded control of its transmission system to SPP, and that SWEPCO purchases NITS from SPP pursuant to the SPP OATT.¹⁶ As acknowledged in Eastman’s motion, SWEPCO

¹³ *Town of Fairview v. City of McKinney*, 271 S.W.3d 461, 467 (Tex. App.—Dallas 2008, pet. denied) (citing *Dodson v. Watson*, 110 Tex. 355, 358, 220 S.W. 771, 772 (1920)).

¹⁴ See, e.g., *Application of Entergy Texas, Inc. for Authority to Change Rates, Reconcile Fuel Costs, and Obtain Deferred Accounting Treatment*, Docket No. 39896, Proposal for Decision (PFD) at 52-53 (July 6, 2012) (defining a *prima facie* case as sufficient evidence “to allow the fact-trier to infer the fact at issue and rule in the party’s favor”).

¹⁵ *Id.* at 53. The Commission agreed with the PFD that ETI made a *prima facie* case on the contested issue. *Application of Entergy Texas, Inc. for Authority to Change Rates, Reconcile Fuel Costs, and Obtain Deferred Accounting Treatment*, Docket No. 39896, Order on Rehearing at Finding of Fact 47 (Nov. 1, 2012) (ETI established a *prima facie* case concerning the prudence of its storm damage expenses incurred since 1996.)

¹⁶ See Direct Testimony of Wayman L. Smith at 4:14-17; Direct Testimony of Daniel R. Boezio at 5:1-4; *id.* at 5:19-20.

offered testimony from John O. Aaron and Jennifer L. Jackson concerning the disputed transmission charges.¹⁷ In addition to the testimony that Eastman references, there is also testimony discussing SPP transmission charges billed to SWEPCO under the SPP OATT and SWEPCO's obligation to pay such charges.¹⁸ Eastman also fails to mention that Exhibit JOA-5 to Mr. Aaron's direct testimony identifies the total dollars billed by SPP and neglects to address that Exhibit JLJ-2 to Ms. Jackson's direct testimony includes a description of the proposed tariff change. The proposed new tariff that Eastman challenges was described as follows: "Updated charges and added assessment for SPP required inclusion of behind-the-meter self generation load synchronized with the SWEPCO transmission system."¹⁹ Taken together, not only was there sufficient information imparting notice of these charges and the basis for them and their allocation, at a minimum this testimony (1) identifies and quantifies the charges billed to SWEPCO by SPP; (2) states the rationale for the use of the allocator proposed was because of the BTMG included in SWEPCO's load; and (3) explains that "SWEPCO is also introducing a provision to the SBMAA rate schedules designed to recover the cost of customers with self-generation synchronized with the SWEPCO transmission system whose load is required to be included in SWEPCO's load ratio share from SPP."²⁰ The sum of proof SWEPCO offered in its direct case is more than sufficient to meet the initial low burden of establishing a prima facie case and permit a fact-trier—as well as the parties, including Eastman—to infer facts associated with this evidence would be at issue in

¹⁷ Motion to Strike at 6 (citing Direct Testimony of John O. Aaron at 18:4-13; Direct Testimony of Jennifer L. Jackson at 22:9-12, 23:4-16).

¹⁸ Direct Testimony of John O. Aaron at 29:6-15, 30:14-31:2. There is also testimony wherein Mr. Aaron describes the Approved Transmission Charges (ATC) component of the Transmission Cost Recovery Factor (TCRF) where these costs are collected. *Id.* at 28:13-23.

¹⁹ Exhibit JLJ-2 to the Direct Testimony of Jennifer L. Jackson.

²⁰ Direct Testimony of Jennifer L. Jackson at 15. Further, the proposed transmission rate is found at Schedule Q-8.8.

this case.²¹ Indeed, two parties were able to conduct discovery and prepare substantial testimony on the issue, which is clear indicia that there was at least enough evidence from which the relevant facts at issue could be inferred.²² Eastman's contention that SWEPCO did not satisfy the minimum amount of testimony and evidence required under the Commission's standard is wrong.

More importantly, there is no dispute that the transmission charges included in SWEPCO's application were actually charged by SPP and incurred by SWEPCO. Yet, Eastman asserts that SWEPCO had the burden to offer *further* testimony "to justify" the inclusion of these charges and SWEPCO's corresponding proposals to allocate these charges, a claim that is wholly unfounded. To the contrary, the Commission has clearly expressed that such cost information requires no further proof of reasonableness.²³ The Commission has explained: "Under the filed rate doctrine, proof that the SPP charges included in the approved transmission charges were billed to and paid by SWEPCO pursuant to the SPP OATT demonstrates the reasonableness of the charges for retail ratemaking purposes *as a matter of law*."²⁴ SWEPCO has offered uncontroverted proof of the charges billed to SWEPCO by SPP pursuant to the SPP OATT, and under Commission precedent, that alone is enough to establish reasonableness. Accordingly, SWEPCO did provide ample proof

²¹ See, e.g., Docket No. 39896, PFD at 54 (July 6, 2012) (explaining that while certain testimony on issue "would have been more helpful" that "the burden of establishing a prima facie case does not require such testimony, if a fact can be reasonably inferred from other evidence presented.").

²² *Infra* at 12-13.

²³ See *Application of Southwestern Electric Power Company for Approval of a Transmission Cost Recovery Factor*, Docket No. 42448, Final Order at Conclusion of Law (COL) 18 (Nov. 24, 2014) (citations omitted) (emphasis added); see also *id.* at COL 16 ("SWEPCO is obligated to pay SPP the charges SPP bills to SWEPCO pursuant to the OATT for the provision of transmission services to SWEPCO.").

²⁴ *Id.* at COL 18 n.15; see also JOA-5 (identifying total amounts billed by SPP); see also Direct Testimony of Wayman Smith at 4:14-17; Direct Testimony of Dan Boezio at 5:1-4 and 5:19-20. The SPP charges associated with NITS are booked to FERC Accounts 561 and 565. This information is contained in Schedule P at P 2.

on this issue, such that would enable the trier of fact to find in its favor if the evidence went uncontradicted, consistent with the standard for a *prima facie* case.²⁵

Finally, SWEPCO's presentation on this issue, for which it has set forth a *prima facie* case, is distinguishable from the case Eastman emphasizes in support of its motion.²⁶ In that case, the utility put on virtually no evidence in its direct case to support the prudence of its Major Underground Rehabilitation program or through discovery until rebuttal.²⁷ The ALJs there noted the utility failed to provide supportive information in response to discovery *expressly* requesting it—except for a single document reference that did not even mention the program.²⁸ What is particularly distinguishable from this case and the basis for the ALJs discounting the weight of the information ultimately provided on the issue of the program's prudence was that the information was only provided *after* the deadline for submission of the intervening party's direct testimony and only five days before the hearing.²⁹ There are no parallels to this case. By contrast, SWEPCO has presented evidence of a type the Commission has expressly determined to be sufficient to establish the reasonableness of the included transmission charges. And SWEPCO has timely provided responsive information requested by intervenors on the contested issue here.

2. Mr. Locke and Mr. Ross filed proper rebuttal testimony.

The fact that SWEPCO made a *prima facie* case on the issue of SPP OATT transmission charges and the BTMG issue undermines Eastman's claims that Mr. Locke's and Mr. Ross's testimonies are improper rebuttal testimony that should have been proffered on direct. Under

²⁵ SWEPCO certainly provided evidence from which the ALJs can infer that the SPP OATT related transmission expenses were prudently incurred.

²⁶ See Motion to Strike at note 15 (citing *Application of CenterPoint Energy Houston Electric, LLC for Authority to Change Rates*, Docket No. 49421, PFD at 19-22 (Sept. 16, 2019)).

²⁷ Docket No. 49421, PFD at 22.

²⁸ *Id.* at 20.

²⁹ *Id.* at 22.

Eastman's view, SWEPCO's burden on direct would be enormous and unreasonably onerous. Any number of issues are regularly contested by participants in a rate case, but that does not alter the initial burden of production on a party. By Eastman's telling, SWEPCO's burden of production includes anticipating any potential disagreements or challenges it may receive on the multitude of issues to be addressed in this proceeding and addressing myriad approaches or claims related to them *in its direct case*. And SWEPCO purportedly should have done this without knowing which issues would ultimately be raised and addressed and to what extent by parties. Not only would that approach be inefficient, it would be costly. It would necessitate tens of thousands of pages of production based on speculation to preemptively rebut every issue that could be raised.³⁰ This is not remotely the standard applied in cases before the Commission.³¹

The rebuttal testimonies of Mr. Locke and Mr. Ross are responsive, material, and relevant and undoubtedly intended to aid in the resolution of the disputed issues in this case.³² It is elementary that rebuttal testimony can be used to respond to and therefore develop the contested issues in a case.³³ Here, Mr. Locke and Mr. Ross offered testimony that specifically rebuts and

³⁰ The Commission has explained that the *prima facie* standard was developed "to aid in the trial of utility prudence reviews. It is a tool to assist in conducting efficient hearings. It is crafted to accommodate the voluminous, highly technical evidence required to establish the prudence of investment in electric power plants. The Commission's *prima facie* procedure allows the utility to establish the prudence by introducing evidence that is comprehensive, but short of proof of prudence of every bolt, washer, pipe hanger, cable tray, I-beam, or concrete pour." *Entergy Gulf States, Inc.*, 112 S.W.3d at 214 n.5.

³¹ See *supra* at 3-4 (describing burden of production and standard for setting forth *prima facie* case).

³² See, e.g., Direct Testimony of Jeffrey Pollock at 13-25 (raising and addressing BTMG issues); Direct Testimony of Ali Al-Jabir at 4-26 (raising and addressing BTMG issues including ratemaking and allocation). In direct contrast from Eastman's feigned harm, granting the request to strike SWEPCO's testimony will result in a very real deprivation of SWEPCO's due process rights by preventing it from responding to the arguments and recommendations raised by TIEC witness Pollock.

³³ 16 TAC § 22.203.

addresses the specific issues placed in contention by TIEC and Eastman.³⁴ Repeatedly asserting that SWEPCO's testimony was improperly offered in rebuttal does not make it so. SWEPCO has not advanced *any* new position but rather defended the transmission charges and rate proposals it expressly identified and included in its direct case, while refuting the arguments and contentions presented by TIEC and Eastman.³⁵ A review of each of their testimonies demonstrates that the narrative testimony offered and the supporting documents rebuts specific points raised by intervenors.³⁶

3. Eastman's due process arguments should be rejected because Eastman has suffered no deprivation and has neither alleged nor established any harm.

a. Applicable Legal Standard—Due Process

Parties to a contested case are entitled to an opportunity for hearing and to respond to and present evidence and argument on each issue involved in the case.³⁷ "The basic elements of due process at the agency level are notice, hearing and an impartial trier of facts."³⁸ The Texas Supreme Court has described due process requirements in administrative proceedings as the

³⁴ 16 TAC § 22.203(b)(3) ("The party with the burden of proof may rebut evidence presented by opposing parties after all parties have presented their direct case."); *see Application of El Paso Electric Company to Change Rates*, Docket No. 44941, Order No. 20 Ruling on Motions at 1 (May 3, 2016) (agreeing that testimony did not introduce new positions but rebutted testimony in opposition to party's direct case); *Joint Petition of El Paso Electric Company and the City of El Paso for Approval of Fuel-Related Provisions of Rate Agreement*, Docket No. 32289, Order No. 16, Ruling on Motion to Strike Rebuttal Testimony, at 2 (Oct. 13, 2006) (denying motion to strike Applicant's rebuttal testimony on the ground that such testimony was properly directed at the testimony and recommendations of an intervenor).

³⁵ As explained in Mr. Ross's rebuttal testimony, SWEPCO did not present a new interpretation of the SPP OATT but has simply complied with the tariff as directed by SPP. Rebuttal Testimony of C. Richard Ross at 8-9.

³⁶ Eastman acknowledges at fn. 22 of its Motion to Strike that the rebuttal testimony of Mr. Locke and Mr. Ross identify the specific arguments and contentions that it is directed toward and meant to rebut. Nonetheless, Eastman persists in characterizing this testimony as improper. As discussed above, the standard Eastman advocates regarding a utility's burden of production is unreasonably onerous and inconsistent with the standard. Moreover, the testimonies of Mr. Pollock and Mr. Al-Jabir lay out a context of general regulatory framework from their point of view in presenting their testimony; SWEPCO should be entitled to do the same.

³⁷ Tex. Gov't Code § 2001.051; *Madden v. Tex. Bd. of Chiropractic Exam'rs*, 663 S.W.2d 626-27 (Tex. App.—Austin 1983, writ ref'd n.r.e.) ("To be meaningful, 'notice' and 'hearing' require previous notice and a hearing relative to the issues of fact and law which will control the result to be reached.").

³⁸ *Geeslin v. State Farm Lloyd's*, 225 S.W.3d 786, 802 (Tex. App.—Austin 2008, no pet.) (citation omitted).

requirement that parties be accorded a full and fair hearing on disputed fact issues, including “the right to cross-examine adverse witnesses and to present and rebut evidence.”³⁹ Significantly, “[i]t is only when a decision is influenced by evidence of which one party has no knowledge or has no chance to confront and explain that a due process problem arises.”⁴⁰ Moreover, a due process deprivation entails a showing of harm—that one’s substantial rights have been affected by the procedures afforded.⁴¹ The determination of whether a party has been accorded due process is made in light of the entire proceeding.⁴²

b. Eastman’s fairness and due process arguments are unfounded and should be rejected.

As discussed above, SWEPCO’s direct case did not conceal or fail to adequately notice Eastman of the transmission charges from SPP related to BTMG. And Eastman has long been aware of its dispute on this issue.⁴³ For example, Eastman confirmed in discovery that it had been discussing with SWEPCO the inclusion of retail BTMG in SWEPCO’s monthly load reported to SPP and was aware that the impact of such inclusion would be addressed in a future rate case.⁴⁴ Separately, TIEC has previously raised the issue of whether another network customer in SPP—specifically, Southwestern Public Service Company (SPS)—should include retail BTMG in its monthly load reported to SPP.⁴⁵ In that case, TIEC also presented the testimony of Jeffry Pollock,

³⁹ *City of Corpus Christi v. Pub. Util. Comm’n*, 51 S.W.3d 231, 262 (Tex. 2001).

⁴⁰ *See Richardson v. City of Pasadena*, 513 S.W.2d 1, 4 (Tex. 1974).

⁴¹ *City of Corpus Christi*, 51 S.W.3d at 262, 263, 264 (“In spite of the hearing and the limited time for cross-examination, the Cities have not shown that substantial rights were violated by the procedures afforded.”).

⁴² *See, e.g., id.* at 262-63 (describing the procedural progress of the case from filing of testimony, the participation in a hearing, the filing of briefs consisting of the opportunity of party to make argument and offer proof).

⁴³ *See, e.g.,* Eastman Chemical Company’s Response to SWEPCO 1-2, CONFIDENTIAL Attachment 4, a copy of which is included as Exhibit A (CONF) to this response.

⁴⁴ *Id.*

⁴⁵ *See generally Application of Southwestern Public Service Company for Authority to Change Rates*, Docket No. 49831, Direct Testimony of Jeffry Pollock at 9-17 (Feb. 10, 2020).

which is virtually identical the testimony he has filed in this case on the issue. SPS filed the rebuttal testimony of Charles Locke, which was very similar to the rebuttal testimony Mr. Locke has filed on behalf of SWEPCO in this case.⁴⁶ Notably, TIEC lists Eastman as one of its members participating in this case.⁴⁷ Given TIEC's past positions on the issue and Eastman's participation as a member of TIEC in this case, it's difficult to see how Eastman was not aware of the issue generally or Mr. Locke's testimony specifically.⁴⁸ Additionally, the very documents attached to Mr. Ross's rebuttal testimony that Eastman has claimed to be "seeing for the first time" were provided by SWEPCO months earlier in response to TIEC's Sixth Requests for Information.⁴⁹

Eastman's repeated contention that it lacked notice and a meaningful opportunity to respond to an issue for which it has already filed 22 pages of direct testimony and engaged in discovery is utterly specious. Eastman propounded discovery on the direct testimony addressing the issue for which it claims it had no notice or meaningful opportunity to respond.⁵⁰ Eastman sought discovery on both Jennifer L. Jackson's and John O. Aaron's testimonies in its First

⁴⁶ See generally Docket No. 49831, Rebuttal Testimony of Charles Locke (Mar. 11, 2020).

⁴⁷ Texas Industrial Energy Consumers' List of Participating Members (Mar. 10, 2021).

⁴⁸ Attached to Mr. Pollock's workpapers, and its discovery responses to SWEPCO's First Request for Information from TIEC, is a memo that was written on behalf of TIEC in 2019 on this very issue. Attachment SWEPCO-TIEC 1-1. This memo also expressly references the March 28, 2018 SPP presentation attached to Mr. Ross's rebuttal testimony. It also references other SPP materials, all of which Eastman would be aware of through its participation in TIEC in this docket. See Docket No. 51415, TIEC's List of Participating Members. The testimonies filed by both Mr. Pollock and Mr. Al-Jabir align with the arguments set forth therein. It is hard to imagine this is coincidental and that Eastman lacked knowledge of the issue generally or in this case.

⁴⁹ On page 8 of its motion, Eastman contends that "SWEPCO went from 21 lines addressing this issue of testimony in its direct case to support its allocation of \$6 million in costs and establishment of a new rate to 40 pages of "rebuttal" testimony and 83 pages of exhibits . . . all of which Eastman is seeing for the first time." This claim is either mistaken or disingenuous. Attached to Mr. Ross's testimony is Exhibit CRR-1R which provides a copy of TIEC's RFI 6-3 and the SPP presentation materials that were provided in response to it on February 17, 2021. At a minimum, as a participating member of TIEC in this docket, Eastman would have been on notice of this information.

⁵⁰ See Eastman Chemical Company's First Requests for Information to Southwestern Electric Power Company (Mar. 8, 2021). Additionally, Eastman has submitted RFIs directed at Mr. Locke's rebuttal testimony, for which it can still test the arguments and assertion therein at the hearing during cross-examination. See Eastman Chemical Company's Second Requests for Information to Southwestern Electric Power Company (May 4, 2021).

Requests for Information. In particular, Eastman 1-3 is directed at p. 23:4-16 of Ms. Jackson's testimony. Eastman 1-4 seeks detailed information concerning, among other things, the "analysis performed by John O. Aaron that produced the \$5.7 million estimated cost for behind the meter load," detailed explanation for "why the proposed synchronized self-generated rate produces" the rate revenues it did, and "a detailed explanation as to why the design of the self-generation rate . . . is consistent with cost causation principles." Eastman 1-5 sought all documents "regarding the change in retail behind-the-meter charges." Any assertion in this instance that Eastman did not understand the import of the testimonies and information supplied in SWEPCO's direct case, that it lacked notice, or was deprived an opportunity to develop its own direct case strains credulity. Indeed, Eastman's startling claim that it is being prevented from "its right to respond" is belied by the fact that it actually has responded.⁵¹

Like Eastman, TIEC has also supplied direct testimony and conducted discovery on the BTMG transmission charges and allocation issues—much of that discovery is attached to Eastman's testimony.⁵² It is confounding that TIEC and Eastman could offer substantial direct testimony on this issue if they had been unfairly deprived knowledge or notice of it. Moreover, Eastman was in no way limited in its direct and has at no point stated what possible information it would have provided in its direct case had it additional opportunity to do so. Significantly, none of the essential elements of due process to which parties are entitled have been deprived in this

⁵¹ Eastman's Motion to Strike at 8.

⁵² From its First Requests for Information, TIEC's 1-7 points directly to Jennifer L. Jackson's testimony: "Referring to page 23, lines 4-10, please provide all documents supporting the assertion that SPP requires load of customers having self-generation that is synchronized with the SWEPCO transmission system to be included in SWEPCO's load ratio share allocation by the SPP." TIEC's First Requests for Information were filed October 22, 2020, less than a month after SWEPCO filed this case. TIEC 1-8, the response of which is attached to the Direct Testimony of Mr. Al-Jabir's testimony, requests the "workpapers supporting the proposed \$2.20 per CP-kW charge for synchronized self-generation load." Additionally, the responsive information provided by SWEPCO to TIEC's Sixth Set of Requests for Information, TIEC 6-11 expressly identifies the Eastman BTMG load used in network reporting.

proceeding.⁵³ As noted above, Eastman will not be prevented in its ability to offer its witness, cross-examine other witnesses, to present its evidence and argument in briefing. Accordingly, Eastman has suffered no deprivation in this proceeding and has failed to identify any violation of its substantial rights warranting the remedy sought in its motion.⁵⁴

4. Eastman's alternative motion to strike also lacks merit.

Eastman's alternative request to strike testimony of SWEPCO witnesses should be rejected for the same reasons as outlined above. The alternative request is designed to accomplish the same excessive unwarranted denial of SWEPCO's ability to fully respond to and address the arguments and recommendations of two intervenors in this proceeding as its primary proposal. As discussed above, Eastman's supposition that SWEPCO was required to establish with further proof and testimony in its direct than it did concerning the reasonableness of the transmission charges included in its test year expenses is both unfounded and contrary to Commission precedent. The additional contextual information and testimony SWEPCO offered in rebuttal to support the basis of the contested transmission charges is proper rebuttal testimony directed at the contentions of intervenors.

II. CONCLUSION

SWEPCO respectfully requests that Eastman's Motion to Strike Rebuttal Testimony be denied in its entirety. SWEPCO requests any such other relief it is shown to be justly entitled.

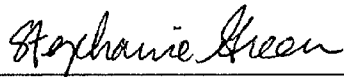
⁵³ See *supra* at 9-10 (explaining the legal standards concerning due process).

⁵⁴ *City of Corpus Christi*, 51 S.W.3d 262, 263, 264 (no denial of due process without establishing harm).

Respectfully submitted,

Melissa Gage
State Bar No. 24063949
magage@aep.com
Leila Melhem
State Bar No. 24083492
lmelhem@aep.com
400 West 15th Street, Suite 1520
Austin, Texas 78701
Telephone: (512) 481-3320
Facsimile: (512) 481-4591
Service Email: aepaustintx@aep.com
**AMERICAN ELECTRIC POWER SERVICE
CORPORATION**

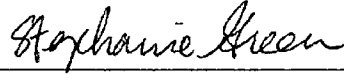
William Coe
State Bar No. 00790477
wcoe@dwmrlaw.com
Kerry McGrath
State Bar No. 13652200
kmcgrath@dwmrlaw.com
Patrick Pearsall
State Bar No. 24047492
ppearsall@dwmrlaw.com
Stephanie Green
State Bar No. 24089784
sgreen@dwmrlaw.com
P.O. Box 1149
Austin, Texas 78767
Telephone: (512) 744-9300
Facsimile: (512) 744-9399
DUGGINS WREN MANN & ROMERO, LLP

By: 
Stephanie Green

**ATTORNEYS FOR SOUTHWESTERN
ELECTRIC POWER COMPANY**

CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on May 11, 2021, in accordance with the Second Order Suspending Rules issued in Project No. 50664 and Order No. 1 in this matter.



Stephanie Green